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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA
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10 UNITED STATES OF AMERICA,
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12 Plaintiff,

13 v.
14 HILARIO ORTIZ-CALDERON,
15 Defendant.

16 CASE NO. CR15-5133 BHS
17
18 ORDER DENYING
19 DEFENDANT'S MOTION TO
20 STRIKE TESTIMONY AND
21 GRANTING IN PART AND
22 DENYING IN PART
 DEFENDANT'S MOTION TO
 COMPEL DISCOVERY

13 This matter comes before the Court on Defendant Hilario Ortiz-Calderon's
14 ("Ortiz-Calderon") motion to strike testimony (Dkt. 101) and motion to compel discovery
15 (Dkt. 103). The Court has considered the pleadings filed in support of and in opposition
16 to the motions and the remainder of the file and hereby rules as follows:

17 **I. PROCEDURAL AND FACTUAL BACKGROUND**
18

19 On February 26, 2015, a grand jury returned an indictment charging Ortiz-
20 Calderon with (1) possession of methamphetamine with intent to distribute, (2) felon in
21 possession of a firearm, and (3) illegal reentry after deportation. Dkt. 12.
22

1 On June 8, 2015, the Government provided the defense with a chemical analysis
2 report that the DEA Laboratory prepared for the substance seized from Ortiz-Calderon.
3 Dkt. 110-1, Ex. A. In analyzing the substance, the DEA Laboratory conducted
4 qualitative and quantitative testing. *Id.* at 3. According to the report, the substance in
5 question was methamphetamine. *Id.* The report further states the methamphetamine
6 weighed 205.7 net grams, had a purity of 97.9%, and contained 201.3 net grams of pure
7 methamphetamine. *Id.*

8 On January 27, 2016, the defense requested seven categories of documents related
9 to the DEA Laboratory's testing. Dkt. 110-1, Ex. B at 6–7. On February 10, 2016, the
10 Government provided additional documents obtained from the DEA Laboratory,
11 including a transmittal of requested materials and the chemist's file. Dkt. 110-1, Ex. C;
12 Dkt. 110-2, Ex. D. The transmittal states that “[a]ny request for additional information
13 should be forwarded to the laboratory in writing.” Dkt. 110-1, Ex. C. The defense did
14 not request additional information.

15 On April 8, 2016, the defense provided the Government with a report prepared by
16 Dr. Neil Spingarn (“Dr. Spingarn”), who reviewed the testing conducted by the DEA
17 Laboratory. Dkt. 110-4, Ex. E. The Government interviewed Dr. Spingarn by phone on
18 April 29, 2016. Dkt. 110-4, Ex. F. Although Dr. Spingarn agreed the substance was
19 methamphetamine, he challenged the reliability of the DEA Laboratory's findings as to
20 the purity of the methamphetamine. *See id.*; *see also* Dkt. 110-4, Ex. E. Dr. Spingarn
21 also indicated he would like to test a sample of the methamphetamine. Dkt. 110-4, Ex. F.
22

1 On May 3, 2016, the Government asked the defense if there were any outstanding
2 requests that should be addressed. Dkt. 110, Ex. G. The defense informed the
3 Government that there were not. *Id.*

4 On May 9, 2016, the parties filed a stipulated motion for orders authorizing testing
5 of the methamphetamine by Dr. Spingarn. Dkt. 88. The motion indicated the defense
6 had agreed to the procedures for testing outlined in the proposed orders. *See id.* at 3. The
7 Court signed the orders during a status conference that day. Dkt. 91. The defense did not
8 raise any concerns about discovery during the status conference. *See id.*

9 On May 16, 2016, Dr. Spingarn advised the Government that he did not like the
10 procedures for testing the methamphetamine. Dkt. 110-4, Ex. H. The defense proposed
11 modifying the orders for testing, but the Government explained that it could not agree to
12 the proposed changes because they were inconsistent with DEA protocol. *Id.* Dr.
13 Spingarn did not ultimately test the methamphetamine.

14 On June 10, 2016, the Government provided the defense with the curriculum vitae
15 of Esther Chege (“Chege”) as a potential rebuttal witness. Dkt. 110-4, Ex. J.

16 On June 15 and 16, 2016, the Court held a bench trial. Dkts. 99, 100. Because
17 Ortiz-Calderon previously pled guilty to illegal reentry and felon in possession of a
18 firearm, Dkts. 51 & 91, the only count at trial was possession of methamphetamine with
19 intent to distribute. During trial, Dr. Spingarn testified. Dkt. 100. The Government also
20 called Chege as a rebuttal witness to address Dr. Spingarn’s testimony. *Id.*

21 On June 16, 2016, Ortiz-Calderon moved to strike Chege’s rebuttal testimony,
22 asserting discovery violations. Dkt. 101. On June 17, 2016, the Court heard argument

1 from the parties on the motion to strike. Dkt. 102. The Court directed the defense to
 2 provide further clarification about the discovery sought and continued the bench trial to
 3 August 8, 2016.¹ *Id.*

4 On June 21, 2016, Ortiz-Calderon moved to compel discovery. Dkt. 103. On July
 5 1, 2016, the Government responded. Dkt. 110. On July 7, 2016, Ortiz-Calderon replied.
 6 Dkt. 111. On July 12, 2016, the Government filed a supplemental response. Dkt. 114.

7 II. DISCUSSION

8 Ortiz-Calderon seeks to strike Chege's testimony, arguing the Government failed
 9 to comply with its discovery obligations under Federal Rule of Criminal Procedure 16.
 10 Dkt. 101. Ortiz-Calderon also seeks to compel the production of ten categories of
 11 documents related to the DEA Laboratory's testing of the methamphetamine. Dkt. 103.

12 Under Rule 16, the Government must "disclose to the defendant any documents or
 13 objects that are material to preparing the defense, or that the government intends to use in
 14 its case-in-chief at trial." *United States v. Cedano-Arellano*, 332 F.3d 568, 571 (9th Cir.
 15 2003). "To obtain discovery under Rule 16, a defendant must make a *prima facie*
 16 showing of materiality." *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990).
 17 Evidence is material if it is "relevant to the development of a possible defense." *Id.*
 18 "Neither a general description of the information sought nor conclusory allegations of
 19 materiality suffice; a defendant must present facts which would tend to show that the
 20 Government is in possession of information helpful to the defense." *Id.*

21
 22 ¹ Pursuant to the Government's unopposed request, the bench trial was reset for August
 17, 2016. Dkt. 113.

With respect to the motion to strike, the Court finds that the Government has not violated its discovery obligations under Rule 16. The Government provided the defense with all of the lab reports and results in this case, as well as the chemist's file and written summaries of expert witness qualifications. *See* Dkt. 110-1, Ex. A; Dkt. 110-2, Ex. D; Dkt. 110-4, Exs. K, L. Notably, the methamphetamine was available for retesting by the defense's expert, Dr. Spingarn. The Government also asked the defense if there were any outstanding issues that needed to be addressed before trial and the defense advised the Government that there were not. Finally, the defense did not request additional documents or file a motion to compel discovery prior to trial. For these reasons, the Court denies the motion to strike.

As for the motion to compel, the Court grants the motion to the extent the Government has already produced the data pertaining to the traceability of the standards used in the quantitative testing. The disputed issue in this case is the purity of the methamphetamine. To determine the purity of the methamphetamine, the DEA Laboratory conducted quantitative testing. Dkt. 110-1, Ex. A at 3. In his report and at trial, Dr. Spingarn challenged the reliability of the DEA Laboratory's quantitative testing because (1) he did not have data showing that the standards used in the quantitative testing were stable, and (2) he did not know the traceability of the standards that were used. *See* Dkt. 110-4, Ex. E at 5–6; Dkt. 106 at 88–89, 115–16. In light of Dr. Spingarn's testimony, the traceability of the standards used in the quantitative testing is material. The defense, however, has failed to demonstrate the additional information

1 sought is material to the Court's determination of the facts. Accordingly, the motion to
2 compel is denied as to all other requests.

3 **III. ORDER**

4 Therefore, it is hereby **ORDERED** that Ortiz-Calderon's motion to strike
5 testimony (Dkt. 101) is **DENIED** and motion to compel discovery (Dkt. 103) is
6 **GRANTED in part** and **DENIED in part** as stated herein.

7 Dated this 28th day of July, 2016.

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10 BENJAMIN H. SETTLE
11 United States District Judge